MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 009** **Government's Response** To Defense Motion To End Presumptive Classification 2 May 2012

1. Timeliness.

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought.

The government respectfully requests that the Commission deny the defense's motion challenging the presumptive-classification process used to protect properly classified information from disclosure.

3. Overview.

This case involves classified information that deals with intelligence sources and methods by which the United States defends itself against international terrorist organizations, including al Qaeda and its affiliates.[1] Each of the accused is in the unique position of having had access to classified intelligence sources and methods. The government, like the defense, must protect that classified information from disclosure.

[1] In support of this motion, the Government respectfully requests that the Commission consider the Central Intelligence Agency ("CIA") Declaration filed in support of the Government's Motion for a Protective Order for Classified Material, which invokes the classified information privilege and explains how disclosure of the classified information at issue would be detrimental to national security. *See* AE 13.

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To that end, the government uses a process whereby statements of the accused are treated as classified until an Original Classification Authority ("OCA") conducts a classification review. The OCA neither classifies nor declassifies any statements of the accused during the classification review. Instead, the OCA reviews the statements to determine what statements are classified, if any, and that determination is based on previously established guidelines.

The process, which informally has been termed presumptive classification, simply is the control mechanism used to protect from disclosure the classified information to which the accused is privy. Contrary to the defense's assertion that the government seeks to "prevent or delay the release of information that does not require protection in the interest of national security" (AE 009, p. 15), the government's purpose in using the presumptive-classification process is quite the opposite. The government seeks to prevent the release of classified information that requires protection in the interest of national security, while ensuring manageable handling procedures that enable the accused and counsel access to evidence that is material to the preparation of the defense in the least burdensome manner.

The defense mischaracterizes the government's efforts to protect classified information as "institutionaliz[ing] the practice of classifying unclassified but potentially embarrassing information." AE 009, p. 2. This simply is not true. To be clear, the government does not *classify* unclassified information. The defense's argument is premised on the terminology used by the government, *i.e.*: presumptive classification, suggesting that the terminology illustrates the government's purported attempt to create a new category of classified information that has no basis in law. The government, however, did not create a new category of classified information. The government merely uses a process to identify what facts within the accused's statements are classified and, after identifying the classified portions, the government separates the unclassified

information in order to minimize that which must be protected from disclosure. Stated differently, the government's use of the presumptive-classification process allows it to maximize the release of unclassified information "born" contemporaneously with classified information.

Accordingly, the Commission should deny the defense's motion to end the government's presumption-classification process used to protect classified information from disclosure.

4. Burden of proof.

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts. On 31 May 2011 and 26 January 2012, pursuant to the Military Commissions Act of 2009, charges related to the 11 September 2001 terrorist attacks were sworn against Khalid Sheikh Mohammad, Walid Muhammad Salih Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi (collectively referred to as the "accused"). These charges were referred jointly to this capital Military Commission on 4 April 2012. The accused are charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, and Terrorism.

On 11 September 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. After the hijackers killed or incapacitated the airline pilots, a pilot-hijacker deliberately slammed American Airlines Flight 11 into the North Tower of the World Trade Center in New York, New York. A second pilot-hijacker intentionally flew United Airlines Flight 175 into the South Tower of the World Trade Center. Both towers collapsed soon thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight 77, into the Pentagon in Northern Virginia. A fourth hijacked airliner, United Airlines Flight 93, crashed

into a field in Shanksville, Pennsylvania, after passengers and crew resisted the hijackers and fought to reclaim control of the aircraft. A total of 2,976 people were murdered as a result of al Qaeda's 11 September 2001 attacks on the United States. Numerous other civilians and military personnel also were injured. The al Qaeda leadership praised the attacks, vowing that the United States would not "enjoy security" until al Qaeda's demands were met. The United States Congress responded on 18 September 2001 with an Authorization for Use of Military Force.

In response to the terrorist attacks on 11 September 2001, the United States instituted a program run by the CIA to detain and interrogate a number of known or suspected high-value terrorists, or "high-value detainees" ("HVDs"). This CIA program involves information that is classified TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (TS/SCI), the disclosure of which would cause exceptionally grave damage to national security. The accused are HVDs and, as such, they were participants in the CIA program.

Because the accused were participants in the CIA program, they were exposed to classified sources, methods, and activities. Due to their exposure to classified information, the accused are in a position to disclose classified information publicly through their statements. Consequently, any and all statements by the accused are presumptively classified until a classification review can be completed.

On 6 September 2006, President George W. Bush officially acknowledged the existence of the CIA program and he announced that a group of HVDs had been transferred by the CIA to Department of Defense ("DoD") custody at Joint Task Force – Guantanamo (JTF-GTMO). *See* President George W. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Remarks from the East Room of the White House, Sep. 6, 2006, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html. The

five accused were among the group of HVDs transferred to DoD custody, and they have remained in detention at JTF-GTMO since that time.

Since 6 September 2006, a limited amount of information relating to the CIA program has been declassified and officially acknowledged, often directly by the President. This information includes a general description of the program; descriptions of the various "enhanced interrogation techniques" that were approved for use in the program; the fact that the so-called "waterboard" technique was used on three detainees; and the fact that information learned from HVDs in this program helped identify and locate al Qaeda members and disrupt planned terrorist attacks. *See id.*; *see also* CIA Inspector General, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, May 7, 2004, *available at* http://media.washingtonpost.com/wp-srv/nation/documents/cia_report.pdf.

Other information related to the CIA program has not been declassified or officially acknowledged, and, therefore, such information remains classified. This classified information includes allegations involving (i) the location of detention facilities, (ii) the identity of cooperating foreign governments, (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees, (iv) interrogation techniques as applied to specific detainees, and (v) conditions of confinement. The disclosure of this classified information would case exceptionally grave damage to national security.

6. <u>Law and Argument</u>.

I. The determination whether to classify information is committed solely to the Executive Branch.

The determination whether to classify information, and the proper classification thereof, is a matter committed solely to the Executive Branch. *See, e.g., Dep't of Navy v. Egan,* 484 U.S. 518, 527 (1988)("The authority to protect such information falls on the President as head of the

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Executive Branch and as Commander in Chief."). The Supreme Court has recognized this broad deference to the Executive Branch in matters of national security, holding that, "it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *CIA v. Sims*, 471 U.S. 159, 180 (1985). The Commission should not conduct a *de novo* review of the government's decision to classify information, nor should it review the classification level assigned to information by the government. *See*, *e.g.*, Military Commission Rule of Evidence 505(f), Discussion (stating the military judge simply should determine "that the material in question has been classified by the proper authorities in accordance with appropriate regulations."). While acknowledging the fundamental role that courts serve in ensuring that the rights of defendants are protected and that procedures are fair, courts consistently have recognized the principle that neither an accused nor the courts can challenge the classification of information. *See*, *e.g.*, *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984), *vacated on other grounds,* 780 F.2d 1102 (4th Cir. 1985)(en banc)("It is apparent, therefore, that the Government [ ] may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."); *see also, United States v. Aref*, 2007 WL 603510, at *1-4 (N.D.N.Y. Feb. 22, 2007), *aff'd,* 533 F.3d 72 (2d Cir. 2008)(the Court's function in a CIPA case is not to hold mini-trials in which the Judiciary-not the Executive Branch-becomes the arbiter of this Country's national security.); *United States v. Moussaoui*, 65 Fed. Appx. 881, 887, n.5 (4th Cir. 2003). The law is clear: the defense may not challenge the government's decision to classify information.

Simply, the government has a "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. *Dep't of Navy v. Egan,* 484 U.S. at 527.. *See also*, *Snepp v. United States,* 444 U.S. 507, 509, n.3 (1980); *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Totten v. United States*, 92 U.S. 105, 106 (1876). The Supreme Court has repeatedly stressed that courts should be "especially reluctant to intrude upon the authority of the Executive in . . . national security affairs." *Egan*, 484 U.S. at 530; *see also*, *CIA v. Sims*, 471 U.S. 159, 168-169 (1985) (the Director of Central Intelligence has broad authority to protect all sources of intelligence information from disclosure); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (protecting the secrecy of the U.S. Government's foreign intelligence operations is a compelling interest).

Here, the Executive Branch classified certain information in accordance with appropriate regulations. The defense may not challenge the Executive Branch's determination that certain information is classified, nor may it challenge the classification level assigned to that information.

II. The CIA properly classified the statements of the accused.

In accordance with section 1.3(a)(2) of Executive Order 13526, the President has designated the Director of the CIA as an official who may classify information originally as TOP SECRET. Classification determinations are not restricted to written material and specifically may include any knowledge that can be communicated, regardless of its physical form. Exec. Order No. 13526 §6.1(t). In this case, pursuant to Section 1.3(c) of Executive Order 13526, the Director of the CIA has delegated that authority to an OCA within the CIA.

Because the accused have been exposed to highly classified sources and methods, the public disclosure of which reasonably could be expected to cause exceptionally grave damage to

the national security, the OCA properly decided that statements of the accused must be handled in a classified manner—thus the term presumptively classified—until an OCA conducts a classification review to determine what information contained within the statements are in fact classified. When conducting the classification review, the OCA does not classify or declassify the statements; rather, the OCA reviews the statements for classified information based upon previously established guidelines.[2] Simply, the presumptive-classification process is the means by which the government protects classified information uttered by the accused contemporaneously with unclassified information.

Here, an OCA has determined that the accused are in possession of classified material that falls within one of the eight substantive categories of material pursuant to Section 1.4 and meets the conditions set forth in Section 1.1(a).[3] This determination provides a means to restrict

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[2] The CIA was chartered to coordinate intelligence activities relating to national security. *See, e.g.,* H.R. Rep. No. 961, 80th Cong., 1st Sess., 3 (1947); S. Rep. No. 239 80th Cong., 1st Sess., 1 (1947). Under the direction of the Director of National Intelligence pursuant to Section 102A of the National Security Act of 1947, as amended, and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized to protect CIA sources and methods from unauthorized disclosure.

[3] Executive Order 13526 is the current presidential order governing the classification of national security information. Section 1.1(a) provides that information may be originally classified under the terms of the Order only if the following conditions are met:

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Section 1.4 of Executive Order 13526 requires that for information to be considered for classification, it must concern one of the eight substantive categories, which include: foreign government information; intelligence activities (including covert action), intelligence sources and methods, or cryptology; and foreign relations or foreign activities of the United States, including confidential sources. Pursuant to Section 1.2 of Executive Order 13526, information may be classified as TOP SECRET, SECRET, OR CONFIDENTIAL based on the severity to the

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the unauthorized disclosure of classified information that could cause exceptionally grave damage to the national security from an individual accused who does not hold a security clearance and who owes no duty of loyalty to the United States. Without a process to protect classified information that may be contained within the statements of the accused, the government would be in the unenviable position of having to predict the accused's possible future behavior knowing that their interests are clearly inconsistent with the interests of the national security.

Indeed, if the statements of the accused were not presumed classified, there would be no measure in place to protect against the improper disclosure of classified information. The defense's position would place the government in a Hobson's choice: the government either would have to accept the risk of an accused improperly disclosing classified information, thus jeopardizing the national security of the United States, or the government could decide not to prosecute the accused. Such a choice is tantamount to graymail—the very problem that Congress sought to eliminate when enacting the Classified Information Procedures Act ("CIPA").[4] The presumptive-classification process used by the government is the least burdensome procedure that can be used to protect classified information while not limiting the rights of the accused or intruding into the attorney-client relationship.[5]

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damage to the national security reasonably expected to result from the unauthorized disclosure of information. Thus, if an unauthorized disclosure of information reasonably could be expected to cause *damage* to the national security, that information may be classified as CONFIDENTIAL. If an unauthorized disclosure of information reasonably could be expected to cause *serious damage* to the national security, that information may be classified as SECRET. Finally, if an unauthorized disclosure of information reasonably could be expected to cause *exceptionally grave damage* to the national security, that information may be classified as TOP SECRET.

[4] Graymail is the practice of threatening the disclosure of classified information in order to force the government to refrain from proceeding with a case. *S. Rep. No. 96-823, at 2-5 (1980).*

[5] Section 1.8 of Executive Order 13526 encourages authorized holders of classified information to challenge the classification status in accordance with established agency procedures, if in good faith, they believe that the classification status is improper.

III. Presumptive classification does not violate the First Amendment rights of government employees and contractors.

The defense correctly recognized that "[t]here is no First Amendment right to reveal properly classified information." AE 009, p. 22. *See*, *e.g.*, *Stillman v. C.I.A.*, 319 F.3d 546, 548 (D.C. Cir. 2003) ("If the Government classified the information properly, then [appellant] simply has no first amendment right to publish it."); *see also*, *Snepp v. United States*, 444 U.S. 507, 510 n.3 (1980) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); *see also, ACLU v. DOD*, 584 F.Supp. 2d 19, 25 (D.D.C. 2008)("There is obviously no First Amendment right to receive classified information.")

Nevertheless, the defense claims that the government is violating its First Amendment rights by using a presumptive-classification process designed to protect classified information from disclosure. The defense's claim has no merit. The defense's legal analysis is misplaced, as it relies on inapplicable case law where courts have found that the government may not use prepublication reviews to prevent federal employees from revealing unclassified information. Here, the government is not preventing the defense from revealing unclassified information. The OCA made a determination pursuant to the applicable Executive Order that certain information in the possession of the accused is classified, and where the accused reveals that information, there must be protections in place to prevent its improper disclosure. *See*, *e.g., Al Odah v. United States,* 346 F.Supp. 2d 1, 8-14 (D.D.C. 2004) (court determined that the government's national security concerns were legitimate and, therefore, the defense was required to have a security clearance and to treat all information obtained during the course of their representation as classified until a classification review was conducted).

IV. The defense has been provided with a mechanism to seek classification guidance.

The defense requests that the Convening Authority authorize a mechanism for a classification review without the defense waiving their attorney-client privilege. Such a process already has been suggested by the government in its proposed Protective Order #1 and, as such, there is no reason to consider whether the Convening Authority has the authority to provide the relief requested by the defense.

Specifically, the government's proposed order provides: (1) a Commission Security Officer (CSO) to be appointed by the Commission for the purpose of providing security arrangements necessary to protect against unauthorized disclosure of any classified documents or information in connection with this case; (2) the parties shall seek guidance from the CSO with regard to the appropriate storage, handling, and use of classified information; (3) the CSO shall consult with the OCA of classified documents or information, as necessary, to address classification decisions or other related issues; (4) the CSO shall not reveal to any person, including the government, the content of any conversations the CSO hears by or among the defense, nor may it reveal the nature of the documents being reviewed by the defense or the work generated by the defense, except as necessary to report violations of the Protective Order to the Commission after appropriate consultation with the defense or to carry out other duties pursuant to the Protective Order; and (5) the presence of the CSO shall not operate as a waiver of any applicable privilege under the Military Commissions Act of 2009, 10 U.S.C. § 948a, *et seq.* (M.C.A.), the Rules for Military Commission ("R.M.C."), or the Military Commission Rules of Evidence ("Mil. Comm. R. Evid.").

The procedures outlined in the government's proposed Protective Order #1 would allow the defense to have an OCA separate the classified and unclassified information uttered by the

accused, thus providing the defense with a quick and confidential determination of which statements offered by the accused are in fact classified.[6] This procedure has been employed in military-commission cases since 2008, and it is being used in other active military-commission cases. Simply, the process provides the defense with the appropriate classification level for defense-generated material while simultaneously reducing the risk of inadvertent and unauthorized disclosures of classified material.

V. The presumptive-classification process is the least intrusive means by which the parties can protect classified information from improper disclosure.

The defense in this case is granted access to the accused only after it obtains a TS/SCI security clearance and signs a Memorandum of Understanding (MOU) acknowledging its duties and responsibilities with respect to the handling of classified information. The defense has the same responsibility as the government to ensure that neither party improperly discloses classified information, information reasonably believed to be classified, or information that either party should know is classified.

As it stands, the defense has the option to receive information from the accused and, if it so desires, the defense may submit the information to the designated OCA for a classification review. If the defense decides not to submit the information to the OCA, the defense is required to handle the information received from the accused in a classified manner. The reason for this is simple: when the accused speaks, both classified and unclassified information is "born". Only the OCA can separate the classified information from the unclassified information while also preserving the attorney-client privilege over that information.

[6] In consultations with the defense about classification issues, the OCAs agree not to disclose the information provided to them unless the information possesses a current threat to loss of life or presents an immediate safety issue in the detention facility. Despite several years of this practice in the habeas litigation and in commission cases, the defense cites no instance where an OCA provided government counsel with privileged information.

Although the defense alleges that the presumptive-classification process burdens the attorney-client relationship, the most expeditious manner and least intrusive way to protect classified information while also respecting the attorney-client relationship is the process in place. The alternative—having an OCA monitor the conversations between the accused and counsel so that the OCA can provide a contemporaneous classification review—is far more intrusive and burdensome. Indeed, in that instance, the accused would have to accept the presence of the OCA at their attorney-client meetings, the defense would lose the flexibility to decide what information to provide the OCA for classification review, and the defense would need to schedule meetings with the accused based in part on the OCA's schedule. Simply, there can be no doubt that having the OCA present during each attorney-client meeting is far more intrusive than allowing the defense to decide what information it wishes the OCA to review for classification purposes.

7. Conclusion.

The Commission should deny the defense's motion to end the presumptive-classification process used by the government to protect properly classified information. The process is not used to *classify* unclassified information. Instead, the government uses the process to identify what portions of the accused's statements are classified and, after identifying the classified portions, the government separates the unclassified information in order to minimize that which must be protected by law from disclosure. Accordingly, the Commission should deny the defense's motion.

8. Oral Argument.

The government respectfully requests that the Commission consider and rule on the defense request in an expedited manner. The government is willing to waive oral argument

should the Commission decide to rule on the pleadings; however, if the defense has an opportunity to present oral argument, the government requests an opportunity to be heard. The government further requests that oral argument be heard on 5 May 2012.

9. Witnesses and Evidence.

The government will not rely on any witnesses or evidence in support of this motion.

10. Attachments.

A. Certificate of Service dated 2 May 2012.

Respectfully submitted,

//s//

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of May 2012, I filed AE 009, the **Government's Response to Defense Motion** To End Presumptive Classification with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Joanna Baltes
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